

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
WESTERN WASHINGTON REGION  
STATE OF WASHINGTON

FUTUREWISE, GOVERNORS POINT  
DEVELOPMENT COMPANY, TRIPLE R.  
RESIDENTIAL CONSTRUCTION, INC. AND  
THE SAHLIN FAMILY, ERIC HIRST, LAURA  
LEIGH BRAKKE, WENDY HARRIS AND  
DAVID STALHEIM, AND CITY OF  
BELLINGHAM,

Petitioners,

v.

WHATCOM COUNTY,

Respondent.

**CASE Nos. 05-2-0013 and 11-2-0010c**

**ORDER GRANTING MOTION FOR  
RECONSIDERATION**

**AND**

**AMENDING  
NOVEMBER 21, 2013 ORDER FINDING  
COMPLIANCE**

**I. PROCEDURAL HISTORY**

On November 21, 2013, the Board issued its Order Finding Compliance in the above captioned matter.<sup>1</sup> On December 2, 2013, Petitioner Futurewise, et al. (Futurewise) filed a timely Motion for Reconsideration.<sup>2</sup> Petitioners moved for reconsideration because the Board's November 21, 2013, Order did not decide the question about standards for limiting units and requiring spacing between residential clusters in cluster subdivisions. Petitioners asked the Board to decide the question of whether the amendment to Whatcom County Code (WCC) 20.36.310(6) complied with the Growth Management Act (GMA).<sup>3</sup> Whatcom

<sup>1</sup> GMHB Case Nos. 05-2-2-0013 and 11-2-0010c, *Futurewise v. Whatcom County (Governor's Point Development Company)*. Order Finding Compliance Regarding Issues 1, 2, 3, 4 and 8 (November 21, 2013).

<sup>2</sup> Futurewise Motion for Reconsideration, GMHB Case Nos. 05-2-0013 and 11-2-0010c, *Futurewise v. Whatcom County (Governor's Point Development Company)* (December 2, 2013).

<sup>3</sup> Whatcom County Ordinance 2013-028, Ex. B at 10 of 14 (strike through version). Whatcom County Code 20.36.310 "(6) Design Standard – In order to preserve rural character, no more than 16 residential lots shall be permitted in one cluster and there shall be at least 500 feet of separation between any new clusters, except

1 County did not respond to the Motion. On December 18, 2013 the Board informed the  
2 parties it would respond by January 23, 2014.

## 3 4 II. APPLICABLE LAW

5 In accordance with the Board's rules, the Board may reevaluate its decisions if a  
6 party files reconsideration motions within ten days of a Board order and the motion must  
7 meet at least one criterion for reconsideration.  
8

### 9 WAC 242-03-830 Post-decision motions -- Reconsideration

10 (1) After issuance of a final decision any party may file a motion for  
11 reconsideration with the board in accordance with subsection (2) of this  
12 section. Such motion must be filed and served within ten days of service of  
13 the final decision. Within ten days of filing the motion for reconsideration, a  
14 party may file an answer to the motion for reconsideration without direction or  
15 request from the board. The board may require an answer or additional  
16 briefing from other parties.

17 (2) A motion for reconsideration shall be based on at least one of the  
18 following grounds:

19 (a) Errors of procedure or misinterpretation of fact or law, material to the  
20 party seeking reconsideration; or

21 (b) Irregularity in the hearing before the board by which such party was  
22 prevented from having a fair hearing.

## 23 III. BOARD DISCUSSION

24 Futurewise's motion meets the criteria in the Board's rules on reconsideration by  
25 alleging "an error of fact and law" in the Board's Order Finding Compliance. Futurewise  
26 explains that because the Board was "silent on the issue of whether the amendments to  
27 WCC 20.36.310(6) complied with the GMA"<sup>4</sup> the Board erred in not deciding the question.  
28 Petitioners cite *Low Income Housing Institute* and *Suquamish Tribe* holding that the Board  
29 must resolve all issues as required in RCW 36.70A.290(1) and RCW 34.05.570(3)(f).<sup>5</sup>

30 when the cluster subdivision is located on a parcel or contiguous parcels in the same ownership, greater than  
31 20 acres." (underline shows amendment by Whatcom County).

32 <sup>4</sup> Futurewise Motion for Reconsideration at 2-3.

<sup>5</sup> *Id.* at 3 *Low Income Housing Institute v. City of Lakewood*, 119 Wn. App. 110, 118-19, 77 P.3d 653, 657 (2003); *Suquamish Tribe v. CPSGMHB*, 156 Wn.App 743, 775-780, 235 P.3d 812 (2010).

1 The Board's Compliance Order found the County corrected provisions in WCC  
2 20.36.300 to require enforceable language for cluster developments in rural zones and to  
3 clarify the definition of and restricted uses in reserve areas.<sup>6</sup> The Board found the County's  
4 lot clustering code protected rural character insofar as having enforceable criteria and  
5 dedicating reserve land in perpetuity.<sup>7</sup> However, the Board did not address an amendment  
6 to WCC 20.36.310(6) challenged in Issue 2. This amendment inserted an exception clause  
7 in WCC 20.36.310(6) for cluster subdivisions Ordinance 2013-028. Specifically, the Board  
8 failed to review the following underlined language in the County's cluster development code  
9 which eliminated the cap on the number of lots in a cluster and removed the separation  
10 between clusters except for the very smallest cluster (20 acres or less):  
11

12 **WCC 20.36.310(6)**

13 (6) In order to preserve rural character, no more than 16 residential lots shall  
14 be permitted in one cluster and there shall be at least 500 feet of separation  
15 between any new clusters, except when the cluster subdivision is located on  
16 a parcel or contiguous parcels in the same ownership, greater than 20  
17 acres.<sup>8</sup>

18 The Board has reviewed Petitioners' argument in their September 16, 2013,  
19 Concurrence and Objections about the amendment language in WCC 20.36.310(6).  
20 Petitioners cited to *Panesko*<sup>9</sup> and other Board rulings concerning rural clusters. Petitioners  
21 argued that the County's clustering provisions still violate RCW 36.70A.070(5)(c) "because it  
22 would not reduce low density sprawl and did not minimize and contain rural development as  
23 the GMA requires."<sup>10</sup> Petitioners provided visual evidence of the intensity of rural clustering  
24 at the Greens at Loomis Trail.<sup>11</sup>  
25

26 <sup>6</sup> GMHB Compliance Order (November 21, 2013) at 12-14. See also Whatcom County Ordinance 2013-028,  
27 Ex. B: WCC Title 20 Amendments at 9 of 14. <http://www.co.whatcom.wa.us/council/2013/ord/ord2013-028strike.pdf>

28 <sup>7</sup> *Id.* at 14.

29 <sup>8</sup> Whatcom County Code WCC 20.36.310 (Ord. 2013-057 § 1 Ex. A; 2013; Ord. 2013-028 § 2 Ex. B, 2013;  
30 Ord. 2001-014 § 1, 2001; Ord. 90-45, 1990.

31 <sup>9</sup> *Vince Panesko v. Lewis County WWGMHB* Case No. 00-2-0031c, Final Decision and Order; *Eugene Butler*  
32 *v. Lewis County, WWGMHB* Case No. 99-2-0027c, Compliance Order; and *Daniel Smith. v. Lewis County,*  
WWGMHB No. 98-2-0011c Compliance Order (March 5, 2001), at 3 of 61 and 25.

<sup>10</sup> Futurewise Concurrence with and Objections to Compliance Finding (September 19, 2013) at 12 "Further,  
WCC 20.36.310(6) formerly limited clusters to 16 lots and formerly required a 500 foot separation between any

1 In their Motion for Reconsideration, Petitioners once again explain that the exemption  
2 has the “effect of repealing two of the enforceable criteria applicable to rural cluster  
3 subdivisions larger than 20 acres required by RCW 36.70A.070(5)(c)(i) and (iii).”<sup>12</sup> These  
4 statutory provisions require jurisdictions to “contain or otherwise control rural development”  
5 and “to reduce the inappropriate conversion of undeveloped land to sprawling, low-density  
6 development in the rural area.” With the exemption in WCC 20.36.310(6), the Board finds  
7 the County does not have a limit on the number of lots in a cluster larger than 20 acres or  
8 standards by which to separate clustered subdivisions larger than 20 acres and thus fails to  
9 “contain or otherwise control rural development.”<sup>13</sup>

11 In failing to rule on this issue, the Board overlooked its prior rulings on rural cluster  
12 regulation, including decisions in Whatcom County.<sup>14</sup> In its prior rulings, the Board looked to  
13 RCW 36.70A.050(b) which provides in part:

15 To achieve a variety of rural densities and uses, counties may provide for  
16 clustering ... and other innovative techniques ... that are not characterized by  
17 urban growth and that are consistent with rural character.

18 RCW 36.70A.030(19) defines “urban growth.”

19 “Urban growth” refers to growth that makes intensive use of land for the  
20 location of buildings, structures, and impermeable surfaces to such a degree  
21 as to be incompatible with the primary use of such land for production of  
22 food, other agricultural products, or fiber or the extraction of mineral  
23 resources, rural uses, rural development, and natural resource lands. . .

24  
25 new cluster in all cluster subdivisions. However, Whatcom County Ordinance No. 2013-028 amended WCC  
26 20.36.310(6) so now these limits only apply to cluster subdivisions located on a lot or lots 20 acres or smaller.  
27 So cluster subdivisions proposed for a lot or lots larger than 20 acres, which would be most rural cluster  
28 subdivisions, can have an unlimited number of lots in the cluster and they can be right next to another cluster.”

29 <sup>11</sup> See, Auditor File No 2040305824 and Auditor File No. 2050804976, admitted by official notice. Compliance  
30 Order (Jan. 23, 2014).

31 <sup>12</sup> Motion for Reconsideration at 4.

32 <sup>13</sup> The Board notes under typical rural clustering provisions, a 20-acre parcel in R-5A zone would generally be  
limited to a 4-unit cluster, and in R-2A would be limited to a 10-unit cluster. The Board queries whether a 16-  
unit cap on a cluster in a 20-acre parcel has any effect.

<sup>14</sup> *Whatcom Environmental Council v. Whatcom County*, WWGMHB Case No. 94-2-0009, Third Compliance  
Order (March 29, 1996); *Whatcom Environmental Council v. Whatcom County*, WWGMHB Case No. 94-2-  
0009, Order Re: Invalidity; and *C.U.S.T.E.R. Association v. Whatcom County*, WWGMHB Case No. 96-2-  
0008, Order Re: Invalidity (July 25, 1997), at \*8 of 7.

1 When allowed to spread over wide areas, urban growth typically requires  
2 urban governmental services. . . .

3 The Board determined Whatcom County's 1997 rural clustering provisions "do not  
4 have minimum lot sizes or a maximum number of lots per site and as such continues [sic] to  
5 allow urban growth outside of properly established UGAs."<sup>15</sup> Another Board decision found  
6 Lewis County's unlimited clustering in essence would create new LAMIRDs and "would do  
7 irreparable damage to the rural character," noting that "uncapped clusters characteristically  
8 lead to a demand for urban governmental services."<sup>16</sup> Similarly, a Mason County ordinance  
9 allowing 40 homes on a 100-acre tract was remanded to the county "to cap the clustering in  
10 rural areas so as to preclude sets of clusters of such magnitude that they demand urban  
11 services."<sup>17</sup>

12  
13 This analysis of rural clustering was underscored by the Court of Appeals in  
14 *Suquamish Tribe*. The Court took issue with the Central Board's approval of "clusters of  
15 clusters" for 5,000 acres of rural wooded land in Kitsap County. The Court questioned  
16 Kitsap's regulation which allowed up to 25 units in a cluster and set a 150-foot separation  
17 between clusters.<sup>18</sup> The Court remanded the matter to the Board to consider "whether the  
18 clusters or groups of clusters allowed by the program actually allow urban growth outside  
19 the UGA."<sup>19</sup> The Court was concerned the Kitsap provisions "could create clusters of a  
20 significant size, allowing developers to site clusters relatively near to one another."<sup>20</sup> The  
21 Court concluded rural character was not protected.  
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24 In the present case, Petitioners have the burden of proof to demonstrate that the  
25 County's amended regulation on clustered residential developments will allow densities and  
26 uses that are **characterized by urban growth** and are **not consistent with rural**  
27 **character**. Upon reconsideration, in light of the provisions of the GMA and the case law  
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30 <sup>15</sup> *C.U.S.T.E.R.*, Order Re Invalidity, (July 25, 1997) p. 8

31 <sup>16</sup> *Daniel Smith v. Lewis County*, WWGMHB Case No. 98-2-0011c ( April 5, 1999) FDO, at 6-7 of 17.

32 <sup>17</sup> *Dawes v. Mason County*, WWGMHB Case No. 96-2-0023, FDO (December 5, 1996).

<sup>18</sup> *Suquamish Tribe*, 165 Wn.App. at 750-751.

<sup>19</sup> *Suquamish Tribe*, 165 Wn.App. at 768, n. 20.

<sup>20</sup> *Id.* at 768.

1 cited by Petitioners, the Board finds the County's action amending WCC 20.36.310(6) to  
2 remove limits on number of lots and remove spacing between clusters on all but the  
3 smallest developments does not comply with the GMA. No maximum on the number of lots  
4 and no minimum standards for separation of clusters constitutes urban growth and is  
5 inconsistent with rural character. This exemption allows increased densities and uses that  
6 are characterized by urban growth and are not consistent with rural character. The  
7 exemption also violates the "patterns of land use and development" for rural areas as  
8 defined by RCW 36.70A.030 (15).<sup>21</sup> Further, this exemption does not contain or control  
9 rural development, assure visual compatibility with the surrounding rural area, nor reduce  
10 conversion of undeveloped land as required in RCW 36.70A.070(5)(c).<sup>22</sup>

11  
12 Therefore, the Board finds and concludes that the exemption clause in WCC  
13 20.36.310(6) for cluster subdivisions violates RCW 36.70A.070(5)(b) because it allows  
14 densities and uses that are characterized by urban growth and are not consistent with rural  
15 character. The exemption also violates RCW 36.70A.070(5)(c)(i) and (iii) because the rural  
16 element fails to include measures that both contain rural development and reduce low-  
17 density sprawl.

18  
19 The Compliance Order is amended as follows (additions shown in underline,  
20 deletions shown in ~~striketrough~~):  
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24 <sup>21</sup>RCW 36.70A.030(15) "'Rural character' refers to the patterns of land use and development established by a  
25 county in the rural element of its comprehensive plan: (a) In which open space, the natural landscape, and  
26 vegetation predominate over the built environment; (b) That foster traditional rural lifestyles, rural-based  
27 economies, and opportunities to both live and work in rural areas; (c) That provide visual landscapes that are  
28 traditionally found in rural areas and communities; (d) That are compatible with the use of the land by wildlife  
29 and for fish and wildlife habitat; (e) That reduce the inappropriate conversion of undeveloped land into  
30 sprawling, low-density development; (f) That generally do not require the extension of urban governmental  
31 services; and (g) That are consistent with the protection of natural surface water flows and groundwater and  
32 surface water recharge and discharge areas."

<sup>22</sup> RCW 36.70A.070(5)(c) "Measures governing rural development. The rural element shall include measures  
that apply to rural development and protect the rural character of the area, as established by the county, by:  
(i) Containing or otherwise controlling rural development; (ii) Assuring visual compatibility of rural development  
with the surrounding rural area; (iii) Reducing the inappropriate conversion of undeveloped land into  
sprawling, low-density development in the rural area; (iv) Protecting critical areas, as provided in RCW  
36.70A.060, and surface water and groundwater resources; and (v) Protecting against conflicts with the use of  
agricultural, forest, and mineral resource lands designated under RCW 36.70A.170."

**Page 2, lines 9-16**

On December 2, 2013, Petitioner Futurewise filed a timely Motion for Reconsideration.<sup>23</sup> Petitioners moved for reconsideration asserting the Board's November 21, 2013 Order did not decide the question about standards limiting units in rural clusters and requiring spacing between residential clusters in Whatcom County Code (WCC) 20.36.310(6).<sup>24</sup> Whatcom County did not respond to the Motion. On January 23, 2014, the Board issued this amended order finding compliance for Issues 1, 2, 3, and 8 and non-compliance for WCC 20.36.310(6) of Issue 2.

**Page 13, lines 15-21**

Petitioners also argue the amendment to WCC 20.36.310(6) creates an exemption for clusters on lots 20 acres or larger which allows an "unlimited number of lots in the cluster and they can be right next to another cluster."<sup>25</sup> This exemption violates RCW 36.70A.070(5)(c) and is counter to previous Board decisions because it does not include a limit on the number of lots allowed on the land included in the cluster and does not apply standards for spacing between clusters.<sup>26</sup>

**Page 14, lines 18-21**

Board Discussion and Conclusion

Upon review of the County's action and Petitioners' Motion for Reconsideration regarding WCC 20.36.310(6), the Board finds the Petitioners have failed to carry their

<sup>23</sup> Futurewise Motion for Reconsideration, GMHB Case Nos. 05-2-0013 and 11-2-0010c, *Futurewise v. Whatcom County (Governor's Point Development Company)* (December 2, 2013).

<sup>24</sup> Whatcom County Ordinance 2013-028, Ex. B at 10 of 14 (strike through version). Whatcom County Code 20.36.310: "(6) Design Standards – In order to preserve rural character, no more than 16 residential lots shall be permitted in one cluster and there shall be at least 500 feet of separation between any new clusters, except when the cluster subdivision is located on a parcel or contiguous parcels in the same ownership, greater than 20 acres. (underline shows amendment by Whatcom County)."

<sup>25</sup> Futurewise Concurrence and Objections at 13.

<sup>26</sup> *Whatcom Environmental Council v. Whatcom County*, WWGMHB Case No. 94-2-0009, Order Re: Invalidity and *C.U.S.T.E.R. Association v. Whatcom County*, WWGMHB Case No. 96-2-0008, Order Re: Invalidity (July 25, 1997), at \*6 of 7. *Vince Panesko v. Lewis County*, WWGMHB Case No. 00-2-0031c, Final Decision and Order; *Eugene Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c, Compliance Order, and *Daniel Smith. v. Lewis County*, WWGMHB No. 98-2-0011c, Compliance Order (March 5, 2001) at 3 of 61 & 25.

1 burden of proof demonstrating the County continues to violate the GMA with respect  
2 to WCC 20.36.305; portions of .310; .315; and .320.

3  
4 **Page 15, lines 19-28 and Page 15, lines 1-5**

5 **. . .With this action, the Board finds the County has met the requirements of**  
6 **RCW 36.70A.070(5)(c)(i) and (ii) with respect to WCC 20.36.305; portions of**  
7 **.310; .315; and .320.**

8 However, with respect to the amendment to WCC 20.36.310(6), the Board  
9 finds the Petitioners have carried their burden of proof demonstrating the County  
10 continues to fail to meet GMA rural element requirements by eliminating standards  
11 capping cluster units and separating clusters on lots 20 acres or larger. Allowing this  
12 exemption increases density and violates the “patterns of land use and development”  
13 for rural areas as defined by RCW 36.70A.030(15).<sup>27</sup> Further, this exemption does  
14 not contain or control rural development, assure visual compatibility with the  
15 surrounding rural area, nor reduce conversion of undeveloped land as required in  
16 RCW 36.70A.070(5)(c).<sup>28</sup> In its Order on Reconsideration, the Board addresses this  
17 legal issue and provides its legal analysis.<sup>29</sup> The Board finds that WCC 20.36.310(6)  
18 continues to violated RCW 36.70A.070(5)(c) and remands this matter to the County.  
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23 <sup>27</sup>RCW 36.70A.030(15) "'Rural character' refers to the patterns of land use and development established by a  
24 county in the rural element of its comprehensive plan: (a) In which open space, the natural landscape, and  
25 vegetation predominate over the built environment; (b) That foster traditional rural lifestyles, rural-based  
26 economies, and opportunities to both live and work in rural areas; (c) That provide visual landscapes that are  
27 traditionally found in rural areas and communities; (d) That are compatible with the use of the land by wildlife  
28 and for fish and wildlife habitat; (e) That reduce the inappropriate conversion of undeveloped land into  
29 sprawling, low-density development; (f) That generally do not require the extension of urban governmental  
30 services; and (g) That are consistent with the protection of natural surface water flows and groundwater and  
31 surface water recharge and discharge areas."

32 <sup>28</sup> RCW 36.70A.070-(5)-(c) Measures governing rural development." The rural element shall include measures  
that apply to rural development and protect the rural character of the area, as established by the county, by:  
(i) Containing or otherwise controlling rural development; (ii) Assuring visual compatibility of rural development  
with the surrounding rural area; (iii) Reducing the inappropriate conversion of undeveloped land into  
sprawling, low-density development in the rural area; (iv) Protecting critical areas, as provided in RCW  
36.70A.060, and surface water and groundwater resources; and (v) Protecting against conflicts with the use of  
agricultural, forest, and mineral resource lands designated under RCW 36.70A.170."

<sup>29</sup> GMHB -Case No.11-2-0010c Order Granting Motion for Reconsideration (January 23, 2014) at 3-6.



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#### IV. ORDER

Having reviewed the November 21, 2013, Compliance Order, Futurewise's Motion for Reconsideration, relevant provisions of the GMA and the Board's Rules of Practice and Procedure, prior decisions of the Board and having deliberated the matter, the Board:

1. **GRANTS** the Motion for Reconsideration of Issue 2;
2. **AMENDS** the November 21, 2013, Order Finding Compliance to Order Finding Non-Compliance regarding WCC 20.36.310(6) in Issue 2 and sets a compliance schedule; and
3. **ORDERS COMPLIANCE** shall be achieved by the scheduled below.

Item	Date Due
Compliance Due on identified areas of noncompliance	March 24, 2014
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	April 7, 2014
Objections to a Finding of Compliance	April 21, 2014
Response to Objections	May 1, 2014
<b>Telephonic Compliance Hearing</b> Call 1 (800) 704-9804 and use pin code 7579646#	<b>May 7, 2014</b> <b>1:30 p.m.</b>

Dated this 23<sup>rd</sup> day of January, 2014.

\_\_\_\_\_  
Nina Carter, Board Member

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Margaret Pageler, Board Member

\_\_\_\_\_  
Raymond L. Paoella, Board Member

1 **Note: This is a final decision and order of the Growth Management Hearings Board**  
2 **issued pursuant to RCW 36.70A.300.<sup>30</sup>**  
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31 <sup>30</sup> A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty  
32 days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970.  
It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth  
Management Hearings Board is not authorized to provide legal advice.